United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7476

To be argued by
MORRIS CIZNER or
EDWARD D. LORY

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANTONIO NAPOLI,
Plaintiff-Appellant,

—against—

[TRANSPACIFIC CARRIERS CORP. and
UNIVERSAL CARGO CARRIERS, INC.]

HELLENIC LINES, LTD.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Preliminary Statement

This is an appeal from the judgment dated July 31, 1975 dismissing the plaintiff's complaint after a jury trial before Robert J. Ward, D.J. in the District Court for the Southern District of New York.

The dismissed Complaint alleged a post-amendment diversity action brought by a longshoreman to recover damages for personal injuries suffered while aboard defendant's vessel at her berth at the 47th Street Pier, Brooklyn, New York.

The plaintiff-appellant is Antonio Napoli. The defendant-appellee is Hellenic Lines, Ltd. as the owner *pro hac vice* of the vessel, Hellenic Destiny. The stevedore, who was plaintiff's employer on the date in question was Hellenic Lines, Ltd.

Issues Presented on Appeal

1. Must the jury find as a condition precedent that neither plaintiff nor his co-employees nor the stevedore-employer knew or should have known of a dangerous condition on shipboard before determining whether shipowner was negligent.

2. Does the concurrent negligence of stevedore-employer with shipowner relieve shipowner of liability to injured longshoremen.

Fact Statement

Plaintiff, a longshoreman gangwayman was injured when he fell while performing his job duties on top of a deck cargo of drums on defendant's vessel. [16a]* By custom and practice, plaintiff's station was on top of the said deckload so that he was required to walk and work on top of the unsecured plywood boards which rested on the tops of the deckload of drums. [13a, 117a] Immediately beneath the plywood was an accumulation of snow. [76a] The plywood slipped from underneath the plaintiff causing him to fall. [16a]

On the day of the accident it had been snowing heavily from 2:00 A.M. on, [196a-201a] so that at 11:00 there was

* References are to pages in the Joint Appendix unless otherwise noted.

an accumulation of snow to 2 inches. (19a, 115a) When the plaintiff boarded defendant's vessel at about 8:00 A.M., it was snowing and the longshoremen, including the plaintiff, were required to stand by until 11:00 A.M. when they were ordered to turn to at hatch #5 to discharge cargo from below decks. (7a, 10, 11a, 60a, 61a)

On the main deck just outside of the midship house, a path had been dug by defendant's personnel through the snow to the 3 steps leading to the top of the deck load that was abreast the number 5 hatch. (61a, 62a) The 3 steps permitted access to the plywood boards running aft on top of the deckload, (11a, 115a) which plywood was in place when plaintiff first boarded the vessel at 8 A.M. (20a, 73a). 146a-1 The ship's crew had, sometime between 8 A.M. and 11:00 A.M. upended said plywood boards, spilling more snow on top of the deckload of drums and thereafter replaced the plywood boards on top of the spilled snow on the cargo and failed to secure the plywood. (76a)

It was claimed that the defendant shipowner failed to provide plaintiff with a reasonably safe place to work; that the defendant-shipowner placed the plywood boards on a deckload covered with snow where it knew that the plywood would slip if not secured; shipowner put additional snow on the drums beneath the plywood making the condition complained of more hazardous; that the walking and working surface provided by defendant to plaintiff was unsafe and it knowingly created and maintained this dangerous condition.

POINT I

The Court committed reversible error:

1. In charging the jury that if plaintiff or his stevedore-employer or his co-employees knew or should have known of the dangerous condition complained of, there could be no negligence on shipowner's part.

2. In refusing to charge the jury that concurrent negligence by shipowner and stevedore-employer does not relieve the shipowner from liability.

The Trial Court was wrong in its understanding and interpretation of the applicable law (as it is affected by the 1972 Amendment to the Longshoreman & Harbor Workers' Compensation Act). The charge to the jury was so prejudicial as to constitute reversible error.

After correctly stating that it was the continuing duty of the defendant-shipowner to furnish plaintiff with a reasonably safe place to work and to maintain and keep the place of work in reasonably safe condition and that this continuing duty exists separate and independently from any duty owed to the longshoremen by the stevedore-employer, the Court instructed the jury as follows:

> "Now, if you find the condition complained of by the plaintiff . . . was known to the stevedore or to any of its employees, including the plaintiff, or if this condition was so open and obvious that it should have been observed, then the shipowner owes no responsibility to warn a longshoreman of the open condition. If you find such then you cannot find that the defendant

was negligent and you must return a verdict for the defendant. On the other hand, if you do not so find, then you should consider the question of whether the defendant was negligent and if you find the defendant negligent you must return a verdict for the plaintiff". (167a).

Thus the Court negated the charge with respect to the duty of shipowner to furnish a reasonably safe place to work. It did set up a condition precedent to the finding of negligence, namely—absence of knowledge by stevedore *or any* of its employees, including plaintiff, of the condition complained of. Such a conclusion is not warranted by the 1972 Amendment to the Act and is a throwback to archaic and retrogressive law. If a co-employee, for example, knew of a dangerous condition under such a charge, this knowledge would be imputed to plaintiff and would constitute a bar to his action; and likewise contributory negligence by plaintiff would no longer be comparative.

The Court's charge further stated that if a condition is open and obvious, shipowner has no duty to warn, and implicit in its meaning was that if there is no duty to warn there could be no negligence. The absurdity of such holding is obvious. It may be that a shipowner under certain circumstances has no duty to warn but shipowner's violation of his duty to furnish a reasonably safe place is not surplanted by such non-duty to warn. Absent the duty to warn does not mean shipowner does not still have the duty to furnish a reasonably safe place and the violation of such duty constitutes negligence.

Furthermore, the fact that the condition complained of is open or obvious may be important in determining the

issue of contributory negligence, but it does not change the shipowner's duty to exercise reasonable care; and the exercise of reasonable care in our case includes the obligation to warn the longshoremen or to see to it that the longshoremen know of and appreciate the dangers they are exposed to.

The intent of Congress was not to reach the conclusion as expressed in the Judge's charge.

Both the Senate and House Committees' Reports to Congress recommending passage of the 1972 Amendment, (H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 6 (1972) and S. Rep. No. 92-1125, 92d Cong., 2d Sess. 10 (1972); Benedict on Admiralty, 7 Ed., Vol. 1A, 1973, Appendix B) explained their intent and Congress having passed the Amendment acted with the intent as expressed in the reports.

The Committee reports and thus the intent of Congress was not to lessen the shipowner's duties to longshoremen saying:

> "Thus, *nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous* condition". (H.R. Rep. No. 92-1441 and S. Rep. No. 92-1125, *supra;* Benedict B-10, *supra.*)
>
> "The vessel will still be required to *exercise the same care* as a landbased person in *providing a safe place to work*". (H.R. Rep. No. 92-1441 & S. Rep. No. 92-1125, *supra;* Benedict B-9, *supra*).

And the care required is *reasonable care* commensurate with the dangers to be encountered. It should be noted that the Committee stated that "longshoring remains one of the

most hazardous types of occupations", (H.R. Rep. No. 92-1441 & S. Rep. No. 92-1125 *supra;* Benedict B-10 *supra*) so that the standard of care is necessarily a high degree of care.

To clearly set forth Congressional intent that the shipowner continues to owe to a longshoreman the duty to furnish him with a safe place to work and requires him to correct a dangerous condition if he knows or should have known of same, the Committee reports set forth the following example:

> *"So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that:* 1) *the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it;* or 2) *the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances".* (H.R. Rep. No. 92-1441 & S. Rep. No. 92-1125, *supra;* Benedict B-9 *supra*)

Therefore, where a dangerous condition exists on deck Congress intends that:

1. Shipowner is deemed to be in control of the vessel sufficiently to require him to (a) furnish a longshoreman with a safe place to work; (b) discover any dangerous condition; and (c) correct the dangerous conditions.

2. Shipowner is liable in damages if it (a) *created the dangerous condition* or *knew it was there (actual notice)*

and failed to correct the condition, *or* (b) had *constructive notice,* i.e. the condition existed for such a period of time it *should have been discovered and corrected* by the vessel *in the exercise of reasonable* care under the circumstances, but failed to do so.

3. It makes no difference who creates the condition or how and when created; liability of the shipowner follows failure to correct or remedy same. Where constructive notice is claimed, the standard of reasonable care under the circumstances is applied in discovering and correcting the condition.

Congress further intended:

> "That the admiralty concept of *comparative negligence,* rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which *precludes the defense of 'assumption of risk'* in an action by an injured employee shall also be applicable". (H.R. Rep. No. 92-1441 & S. Rep. No. 92-1125 *supra;* Benedict B-10 *supra*).

It should be also noted that after stating that the shipowner shall not be liable in damages for acts or omissions of stevedores, citing cases, the report stated:

> "This listing of cases is not intended to reflect a judgment as to whether recovery on a particular actual setting could be predicated on the vessel's negligence". (H.R. Rep. No. 92-1441 and S. Rep. No. 92-1125 *supra;* Benedict B-9 *supra*).

Obviously, therefore, the intent of Congress was to hold the vessel owner liable for his own negligence, even though the stevedore was concurrently negligent.

In short, a fair reading of the Congressional Committees' reports show that the intent of Congress in passing the Amendment was to confirm as heretofore the responsibility or duty of shipowner to furnish a safe place to work but to prove a case of liability for negligence, actual or constructive notice must be proven; that the standard of care required is reasonable care under the circumstances; that there are created no new conditions precedent before a shipowner may be held liable for its violation of duty to furnish a safe place to work; that shipowner will still be held liable for its negligence even though stevedore may be concurrently negligent; that unseaworthiness-no fault claims are not allowed; that liability for negligence shall not be absolute and the negligence of the stevedore is not to be imputed to the shipowner.

It should be noted that in the examples set forth by the congressional committees, the oil spill on deck would have been necessarily an open and obvious condition and yet the Act would still permit an action against the vessel for negligence. There is not one word in the Committee Reports to the effect that notice by the stevedore, plaintiff or his co-employees bars his action.

The decision in *Landon* v. *Leif Hoegh & Co.*, decided by this Circuit Court June 18, 1975 (No. 590—September Term, 1974, Docket No. 74-2304) 75 AMC 1106, sets forth additional reasons why the amendment to the Act does not deprive the plaintiff of his cause of action in negligence against this shipowner and points out the fact that the Judge's charge in our case was simply wrong.

The facts in the *Landon* case pertains to a longshoreman injured when he slipped and fell on snow and ice on deck. Shipowner was charged with negligence for permitting it to accumulate. Nowhere in that case does there appear to be any question or claim made that plaintiff may not recover because the snow and ice was an open and obvious condition or the stevedore or plaintiff or his co-employees knew thereof. Actually, the defendant raised the question of concurrent negligence constituting a bar to any action against the shipowner claiming that the plaintiff can recover against it only upon proof that his accident was caused by the sole negligence of the shipowner without any negligence whatever of the stevedore-employer contributing thereto. This Circuit rejected this argument stating that although it was "strictly not before us on this interlocutory appeal, however, because the contention will be raised in trials in the District Courts of this Circuit in actions covered by the 1972 Amendments, we feel we should address ourselves to the contention which we believe to be insubstantial" . . . 75 AMC 1106. 1115—"We cannot agree that some negligence by the employer is enough to cut off the injured longshoreman's protected right to sue the ship for its own negligence. Of course, if the negligence was solely that of the stevedore, the ship would have been found neither negligent nor liable." 75 AMC 1106, 1115. In the course of the trial, the judge in our case seemed to think that this expression by the Circuit Court was merely dicta and when the Court was asked to supplement its charge and to instruct the jury as to concurrent negligence as set forth in the *Landon* case, the Court declined to charge as requested. (178a).

Indicative of the Trial Judge's pre-occupation with the "sole negligence theory" is also the example he gave to the jury in speaking of proximate cause. (169a).

It is submitted that the opinion in the *Landon* case as it pertains to concurrent negligence is not dicta in the accepted sense. The question was raised on appeal and this Court gave a definitive and considered answer setting forth guidelines for the courts and members of the bar to follow in the handling of this type of case. Such a considered expression should not be ignored or treated in an offhand manner.

The Court of Appeals, Ninth Circuit, cited the *Landon* case in support of its holding that a longshoreman can recover his damages *in full from shipowner* if he received injuries caused by the concurring negligence of his stevedore-employer and the shipowner. *Shellman* v. *United States Lines,* CCA 9th, Docket 74-3071, Filed 11-21-75; and *Dodge* v. *Mitsui Shintaku Ginko K.K.,* CCA 9th, docket #75-1442, Filed 11-21-75. In the *Shellman* case the stevedore was 70% concurrently negligent.

There has been a miscarriage of justice as a result of reversible error. The jury could not help but be at best confused and obviously misled as to the proof necessary to make a case of liability on the part of shipowner for its negligence.

CONCLUSION

The Court having committed reversible error in its charge to the jury, the verdict for the defendant should be set aside and a new trial be granted to the plaintiff.

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